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No. 75-407

In the Supreme Court of the United States

OCTOBER TERM, 1975

JOHN L. BEATTIE, JR., PETITIONER,

v.

UNITED STATES OF AMERICA and DONALD M. CERRA,
Special Agent of the Internal Revenue Service.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER TO MEMORANDUM FOR THE UNITED STATES

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The Government apparently does not oppose the petition for a writ of certiorari which the Petitioner has filed in this case. The Government, however, has filed a Memorandum asking that the petition be held pending this Court's decisions in United States v. Kasmir, No. 74-611, and Fisher v. United States, No. 74-18, which were argued on November 3, 1975.

This Brief is respectfully submitted,

pursuant to Rule 39 of this Court, in opposition to that request. We respectfully ask that the Court grant the petition for a writ of certiorari and hear this case for the reasons set forth in the petition and in this Brief.

There are, we submit, important reasons of policy, and also important legal and factual differences between this case on the one hand, and Kasmir and Fisher on the other hand, which support our position in this regard.

In view of the conflict between the decisions of the Third Circuit in Fisher and the Fifth Circuit in Kasmir, the Court of Appeals for the Second Circuit expedited the appeal and decision in this case. (App. B, 6a; appendix references are to the appendix annexed to Petitioner's petition for a writ of certiorari). It stated in its opinion that it deemed it best to render a decision in this case so that the Supreme Court might have before it the variation in the facts in this case from those in Kasmir and Fisher when it decides those cases.1/ The Court of Appeals also extended the stay in this case for fourteen days to give the taxpayer time to apply to this Court for a further stay pending a petition for certiorari. (App. B, 29a, 30a).

In response to Petitioner's application to this Court for a stay, Hon. Thurgood Marshall, Associate Justice, on September 3, 1975 ordered the execution and

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1/ App. B, 7a.

enforcement of the judgment of the Court below stayed pending the filing of a petition for a writ of certiorari in this Court on or before September 17, 1975. Petitioner filed a petition for a writ of certiorari prior to that date. We respectfully infer that the purpose of the expeditious treatment heretofore accorded this case was to enable this Court, if it so saw fit, to hear and decide this case on the particular facts and law involved -- not merely to hold it until Kasmir and Fisher are decided.

Further, it appears likely that the vacancy in this Court will be filled in the near future. We respectfully submit that this case should be heard and decided by the full Court as then comprised.

While the issues herein are similar to those in Kasmir and Fisher, there are also important differences, which militate for a separate hearing and decision:

1. In both Kasmir and Fisher, unlike this case, the summons was directed to the taxpayer's attorney -- not to the taxpayer. Therefore, in both of those cases "the ingredient of personal compulsion against an accused [was] lacking." Couch v. United States, 409 U.S. 322, 329.

2. The Government has filed a petition

for a writ of certiorari in this case from that portion of the decision of the Court below holding that, insofar as the summons served upon the taxpayer requests copies of communications between him and his accountant, it should not be enforced. (App. B, 28a). That question is not involved in Fisher, and is apparently only incidentally involved in Kasmir. We are filing, concurrently herewith, a brief in opposition to the Government's petition. If, however, the Court sees fit to grant that petition, we submit that the taxpayer's petition should likewise be granted so that all issues in this case may be fully briefed, heard and decided.

3. In the present case, the accountant's workpapers were in the taxpayer's possession almost eight months before the summons was served upon him. (App. B, 4a, 5a). In Kasmir, "within minutes of receiving the materials" the taxpayer turned them over to his attorney, and in Fisher the Third Circuit described the taxpayer's possession of the documents as "fleeting and transitory." Taxpayer's long continued possession of the documents in this case is an important factual difference from the situation in those cases.

4. The summons in this case requires the taxpayer to appear and "to give testimony" relating to his own tax liability. (Joint App., C.A. 2nd, p.6). The District Court ordered the summons

enforced in all respects. (App. A, 2a). The Court of Appeals declined to rule on the enforceability of the summons in this regard. (App. B, 6a, footnote 2). The Government in its Memorandum says that this issue is not ripe for review since the taxpayer must first appear and assert the privilege as to each question. (Government Memorandum, p. 3, footnote 2). But whether or not the Government is right as a matter of law generally, the law of this case as it now stands may well be that the taxpayer must not only produce documents but give testimony before the special agent -- in plain contravention of his Fifth Amendment rights. This issue is not involved in either Kasmir or Fisher.

For the foregoing reasons, we submit that the decision in this case should not turn automatically on the decisions in Kasmir and Fisher, but that the petition for a writ of certiorari should be granted so that the issues herein may be fully briefed, and heard and decided by this Court.

Respectfully submitted,

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